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No. 86-1055

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ROBERT PRICE, *et al.*,
Petitioners

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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MEMORANDUM OF THE RESPONDENTS

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As we explain in detail below, the four questions presented in the petition for a writ of certiorari fall into two discrete categories: threshold questions pertaining to the merits of petitioners' claims (Questions 1 and 2) and questions of constitutional procedure and remediation (Questions 3 and 4).

As to the former category, we agree that the court of appeals' decision dismissing plaintiffs' complaint conflicts with the decision of the Fourth Circuit in *Beck v.*

Communications Workers, 800 F.2d 1280 (1985) (en banc), *pets. for cert. pending*, Nos. 86-627, 86-966, and that the conflict is over issues of profound importance that warrant resolution by this Court. Because the earlier filed certiorari petition in No. 86-627 seeking review of the *Beck* decision raises these issues, we believe that the instant petition does not warrant separate plenary consideration. Rather, the disposition of the first two questions here should follow on from the Court's disposition of the *Beck* case.

The lower courts did not decide the procedural/remedial questions plaintiffs attempt to raise as the third and fourth question presented in the certiorari petition in this case precisely because those courts dismissed plaintiffs' complaint on the merits. Accordingly, those questions are not ripe for resolution by this Court at this time. If the lower court's decision on the merits stands undisturbed, the remedial issues, of course, become academic; and if the lower court's decision on the merits were to be overturned, the remedial issues should be remanded for decision below.

1. This case arises out of a collective bargaining agreement between defendant-respondent International Union, United Automobile Aerospace and Agricultural Implement Workers of America ("UAW") and General Dynamics Corporation, Electric Boat Division. That agreement provides, *inter alia*, that all employees of General Dynamics employed in the bargaining unit for which the UAW is the exclusive representative, are, as a condition of continued employment in that unit, to pay to their bargaining representative, the UAW, an amount equal to union dues. Plaintiffs/petitioners are covered by the collective bargaining agreement and object to this union security requirement.

Plaintiffs commenced this action in federal district court alleging that the union security agreement, and its

enforcement, violate plaintiffs' rights under both the First Amendment and § 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3), and also constitute a breach of the UAW's duty of fair representation. The district court dismissed plaintiffs' complaint for failing to state a claim on which relief can be granted, and the Second Circuit affirmed. The court of appeals reasoned that: (i) because "the union security clause was a product of private negotiations and was not attributable to the government, plaintiffs' constitutional challenges were properly dismissed for lack of government action," Pet. App. xiv; (ii) given the absence of state action, there is no basis to read into NLRA § 8(a)(3) a prohibition on union security agreements, especially since that section in terms "makes clear that they [union security agreements] are properly part of our national labor policy," *id.* at xvii; and (iii) plaintiffs' contention that "they should be treated differently" than all other members of the bargaining unit by being exempted from the obligation to pay full union dues "does not implicate the duty of fair representation," *id.* at xix.

In the first two questions presented in their petition, and in the first three parts of their discussion of the reasons for granting the writ, plaintiffs seek review of the decision of the court of appeals on the three issues just outlined. Although we believe that the appellate court correctly resolved these issues, we agree that the Second Circuit's decision on these issues is in square conflict with the decision of the Fourth Circuit in *Beck*. In that decision the Fourth Circuit invalidated a union security agreement analytically indistinguishable from the one at issue here on precisely the grounds rejected by the Second Circuit in the instant case.

We also agree that the issues over which the Second and Fourth Circuits disagree are of profound practical and doctrinal importance. Accordingly, we believe these questions merit resolution by this Court.

In No. 86-627, *Communications Workers of America v. Beck*, the union whose agreement was invalidated in *Beck* has petitioned for review of the Fourth Circuit's decision. On December 8, 1986, the Court invited the Solicitor General to state the views of the United States with respect to that petition.

If the Court were to grant the union's petition in *Beck*, we believe the instant case should be held for *Beck* and the disposition of the first two questions raised here controlled by this Court's ultimate decision in *Beck*. Because the questions presented here and in *Beck* are pure questions of law, all of which are fully and fairly raised in the certiorari petition in No. 86-627, granting a writ of certiorari in this case as well as in *Beck* would, we believe, simply double the number of parties and briefs, without in any way aiding the Court in resolving the issues presented.[1]

2. If, contrary to the decision below, this Court eventually were to hold that the First Amendment, § 8(a)(3), or the duty of fair representation limits the prerogatives of unions and private employers to condition continued employment in a bargaining unit upon the payment of full union dues, a set of further questions would be raised as to the categories of expenditures for which financial support may be required, and the procedures to be used in drawing that line and in collecting monies from objecting employees.

In *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), the Court addressed similar questions with respect to union security agreements negotiated in the airline industry; the Court did so because *Machinists v. Street*, 367 U.S.

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[1] If the Court were to consolidate this case with *Beck*, special procedures would be required for briefing and argument, because having prevailed in this case but lost in *Beck*, the union-defendants are respondents here and petitioners in *Beck*, whereas the objecting employees are petitioners here and respondents in *Beck*.

740 (1961), had earlier held that, in order to avoid "constitutional questions . . . of the utmost gravity," *id.* at 749, the Court would construe § 2, Eleventh of the Railway Labor Act, 45 U.S.C. 152, Eleventh, to limit a union's power to collect full dues from objecting employees. Similarly, in *Chicago Teachers v. Hudson*, —— U.S. ——, 54 L.W. 4231 (March 4, 1986), the Court considered procedural/remedial questions of the sort just noted with respect to union security provisions contained in agreements with a public employer, as such agreements unmistakably involve state action and hence are subject to the limitations of the First Amendment. *See Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

In the instant case, however, the lower courts rejected the plaintiffs' First Amendment claim for lack of state action, and found no limitation in § 8(a)(3) or in the duty of fair representation on the negotiation and enforcement of agreements requiring all members of a bargaining unit to pay full dues to the bargaining representative. Having so held, those courts had no occasion to address the lawfulness of the procedures followed by the Union here in collecting monies for plaintiffs, and in voluntarily rebating monies attributable to political expenditures to objecting employees.[2] As the district court stated:

> Were the adequacy of the rebate scheme a material issue in this case, summary judgment for either party would have been denied, since the operation of the procedure would raise contested questions of fact. Having decided, however, that plaintiffs' constitutional claims must fail for lack of governmental action, and that the claim for breach of the duty of fair representation must fail because the expenditure of dues and fees is a purely internal union matter,

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[2] Such a rebate procedure is provided for in the Union's Constitution. *See* Pet. App. xxiv.

> *I need not pass on the adequacy of the rebate scheme.* [Pet. App. 1v to 1vi; emphasis added] [3]

Notwithstanding the fact that the courts below, having dismissed plaintiffs' complaint on the merits, had no occasion to address the procedural/remedial issues, plaintiffs attempt to bring those issues before this Court in their third and fourth questions presented. And in Part IV of their discussion of the Reasons for Granting the Writ plaintiffs argue those issues at some length.

In no event are those questions properly raised at this time. If the appellate court's decision on the merits is left undisturbed—as we believe it should be—then the procedural/remedial issues would become academic; if, on the other hand, the dismissal of the complaint were to be reversed, then the procedural/remedial issues should be remanded to the lower courts for them to decide in the first instance.

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[3] The only reference to the questions noted in text in the court of appeals' opinion is the following paragraph discussing plaintiffs' fair-representation claim:

> Finally, there is no indication that the union acted in subjective bad faith in spending monies from an account to which appellants have contributed. Indeed, appellants' conclusory claim of bad faith is undercut, at least in part, by the fact that the international union has established a procedure for refunding to appellants and any other objectors monies spent on primarily political causes. *Without deciding whether that particular procedure would be constitutionally adequate if government action had been found here,* we note that the union's rebate program, at a minimum, tends to negate any inference of bad faith. [Pet. App. xx; emphasis added]

This reference to the Union's procedure hardly constitutes an "embrac[e] of the union's rebate procedure," Pet. at 31, and thus does not raise the question of whether the union's procedure is "statutorily and constitutionally adequate," Petition Question 4.

CONCLUSION

For the foregoing reasons, we submit that the petition in No. 86-627, *Communications Workers v. Beck* should be granted and the instant petition held for *Beck*.

Respectfully submitted,

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